Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Pamela J. McLeod, Petitioner

v.

OREGON LITHOPRINT, INC., dba
News-Register Publishing Co.; and
NEWS-REGISTER EMPLOYEES' INSURANCE
PLAN, Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 (ERISA) provides that a civil action may be brought to obtain appropriate equitable relief to redress violations of ERISA. 29 U.S.C. § 1132(a)(3).

Petitioner hereby petitions for a Writ of Certiorari with respect to the following issues:

1. May an individual plan participant obtain appropriate equitable relief under 29 U.S.C. § 1132(a)(3) to redress violations of the ERISA fiduciary standards?

2. Does "appropriate equitable relief" available under 29 U.S.C. § 1132(a) include surcharging a negligent fiduciary to recover losses resulting from the breach to the extent such relief has typically been available in equity cases?

3. Once equitable jurisdiction has been exercised over a matter, does the court of equity have the authority under 29 U.S.C. § 1132(a)(3) and the "equitable clean-up" doctrine to grant complete relief, including "legal relief" in the form of compensatory and emotional distress damages, to remedy the wrong?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PAMELA J. MCLEOD, Petitioner,

v.

OREGON LITHOPRINT, INC., dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pamela J. McLeod respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in McLeod v. Oregon Lithoprint, Inc. (App., infra 2a-14a) is reported at 46 F.3d 956 (1995). The opinion of the District Court (App., infra, 15a-26a) is reported at 815 F.Supp. 1364 (D.Or. 1992).

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on February 1, 1995 (App., infra, 2a).

McLeod's Petition for Rehearing was denied by the Ninth Circuit Court of Appeals on April 3, 1995 (App., infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

McLeod seeks relief under 29 U.S.C. § 1132(a)(3) which reads, in pertinent part, as follows:

> "§ 1132 Civil Enforcement. (a) Persons empowered to bring a civil action. A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan . . . ."

STATEMENT

A. Statement of the Case.

In the United States District Court for the District of Oregon, District Judge Malcolm Marsh granted summary judgment for the Respondents, Oregon Lithoprint, Inc. Petitioner McLeod appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the District Court's decision granting summary judgment for the Respondents and reversed, the District Court in part, with the case being remanded for trial on the claim of statutory penalties for failure to provide documents requested pursuant to 29 U.S.C. § 1024(b)(4). This Petition for a

Writ of Certiorari only relates to the portion of the Ninth Circuit decision which affirmed the District Court's granting of summary judgment on Petitioner's claims for individual relief under 29 U.S.C. § 1132(a)(3).

On April 2, 1995, the Ninth Circuit denied McLeod's Petition for Rehearing.

B. Statement of Facts.

McLeod was a participant in an employee benefit plan sponsored by her employer, Oregon Lithoprint, Inc. McLeod has alleged that Oregon Lithoprint, Inc., a plan fiduciary, breached its fiduciary duty by failing to timely notify her of her eligibility to apply for cancer insurance coverage under the plan. McLeod seeks to surcharge the fiduciary for breach of trust in the amount of the benefits she would have been entitled to receive had she been able to enroll in the cancer insurance coverage. McLeod also seeks damages for emotional distress.

C. Proceedings Below.

The Ninth Circuits' decision herein held that an individual plan participant could not seek individual relief under § 1132(a)(3) for violations of ERISA fiduciary duties under 29 U.S.C. § 1104(a)(1) and that compensatory damages were unavailable as a category of appropriate equitable relief under ERISA for breach of fiduciary duty.

D. Basis of Federal Court Jurisdiction.

This action was brought under 29 U.S.C. § 1132(a)(3). The Federal Courts have exclusive jurisdiction of civil actions brought under ERISA. 29 U.S.C. § 1132(e)(1).

REASONS FOR GRANTING THE PETITION

I. Reasons For Granting a Writ of Certiorari.

A. Introduction.

On April 24, 1995, this court granted a writ of certiorari in Varity Corp. v. Howe, ___ U.S. ___ 115 S.Ct. 1792, 131 L.Ed2d 720 (1995). One of the questions accepted for review in Varity Corp. was whether an individual claim for relief may be brought under 29 U.S.C. § 1132(a)(3) for a violation of ERISA fiduciary duties under 29 U.S.C. § 1104(a) with respect to an employee benefit plan. McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956 (9th Cir. 1995) presents the identical question, plus two additional issues involving the interpretation of the phrase "other appropriate equitable relief" in 29 U.S.C. § 1132(a)(3). The Courts' decision in Varity Corp., will be dispositive of one of the issues in McLeod. (See Question No. 1, supra). The Petition for a Writ of Certiorari should be granted with respect to Question No. 1 and the first issue in the McLeod case decided by this court simultaneously with its decision in Varity Corp.

In addition, the Petition in McLeod should be granted with respect to Questions Nos. 2 and 3 because it presents additional related questions involving the same statutory provisions but which will not be decided in Varity Corp. The Court should grant the Petition and impose an accelerated briefing schedule so that McLeod and Varity Corp., may be argued and decided as companion cases. Such treatment would allow the Court to address several related questions which arise under the statute as a single matter and reduce future litigation in the lower courts.

This case provides the opportunity for the Court to formulate a test or standard to determine whether the relief requested in this and future cases is available as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). A more definitive test than is presently available is necessary to resolve a conflict in the Circuit Courts on an important issue which potentially impacts the employee pension and welfare plans of millions of employees.

The United States Supreme Court should hear this case because the circuit courts of appeal have split on the questions of whether (1) a plan participant may bring a claim under 29 U.S.C. § 1132(a)(3) for individual relief, and (2) the types of relief available under the statutory provision which permits "appropriate equitable relief."

B. Conflicts Among the Circuits.

The Ninth Circuit held in McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956 (9th Cir. 1995) that participants in employee benefit plans may not seek individual relief for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3). Other Circuits have allowed individual claims for relief under § 1132(a)(3) and have specifically allowed monetary relief as a form of appropriate equitable relief.

The Seventh Circuit in Anweiler v. American Electric Power Service Corp., 3 F.3d 986 (7th Cir. 1993) interpreted the U.S. Supreme Court's decision in Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993) as permitting individual plan participants to bring claims for individual relief pursuant to § 1132(a)(3). The Seventh Circuit's decision followed the interpretation urged by the U.S. Secretary of Labor in an amicus curiae brief filed with the Court. Since Mertens, other circuits have also held or

permitted participants to bring individual claims under § 1132(a)(3). See Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994); Mullins v. Pfizer, 23 F.3d 663 (2nd Cir. 1994); Bixler v. Central Penn Teamsters Health & Welfare Fund, 12 F.3d 1292 (3rd Cir. 1993) and Howe v. Varity Corp., 36 F.3d 746, cert. granted sub. nom., Varity Corp. v. Howe, 115 S.Ct. 1792, 131 L.Ed.2d 720 (1995) (8th Cir. 1994).

Prior to Mertens, the Fifth, Sixth and D.C. Circuits permitted claims by individual participants under § 1132(a)(3) for breach of fiduciary duty. See Corcoran v. United Healthcare, Inc., 965 F.2d 1321 (5th Cir. 1992); Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990) and Eddy v. Colonial Life Ins. Co., 919 F.2d 747 (D.C. Cir. 1990).

In addition to excluding individual claims for relief, the Ninth Circuit, in McLeod, held that "appropriate equitable relief" under 29 U.S.C. § 1132 does not include monetary or compensatory relief for losses resulting from a breach of fiduciary duty or emotional distress damages.

The Third and Sixth Circuits have followed the opposite approach which was suggested in Justice Brennan's concurring opinion in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 149, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), and specifically allowed monetary relief as "appropriate equitable relief" under § 1132(a)(3): See Bixler v. Cent. Pa Teamsters Health-Welfare Fund, 12 F.3d 1292 (3rd Cir. 1993); Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990) and Boland v. Chrysler Corp., 13 EBC 2456 (6th Cir. 1991). Contra: Novak v. Andersen Corp., 962 F.2d 757 (8th Cir., 1992).

The Sixth Circuit has recently held that monetary relief in the form of front and back pay under §

1132(a)(3) are "appropriate equitable relief" under § 1132(a)(3), to compensate an employee for a retaliatory discharge in violation of § 1140. Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995).

C. The Importance of the Issue.

Serious problems exist with ERISA when it is possible for a plan fiduciary, whose duty it is to protect participants and safeguard benefits, to engage in fraudulent, bad faith or negligent conduct without any remedy existing for wronged participants.[1] The thought that an employer-fiduciary could intentionally deceive an employee about his or her benefits, an insurance company could in bad faith deny coverage for potentially life saving medical benefits, or that administrator's errors could cause losses of coverage or benefits to individual employees without any remedy under either state law or ERISA is astonishing. However, individual workers in the Ninth Circuit do not have any means of bringing a claim or making themselves whole through monetary relief under ERISA or state law claims because of the following decisions:

(1) In McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956 (9th Cir. 1995), the Ninth Circuit held that a participant deprived of benefits because

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[1] This problem has been well documented in a series of articles entitled "Betrayal without Remedy" by Robert Eccles and David Gordon in the ERISA Litigation Reporter. See also Zanglein, "Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA." 7 Wash. Univ. LQ 671 (1994); and William Carr and Robert Liebross, "Wrongs Without Rights." 4 Stan. L & Pol'y Rev. 221 (1992/1993).

of an ERISA fiduciary's negligence has no remedy under ERISA. State law claims were preempted.

(2) In Watkins v. Westinghouse Hanford Co., 12 F.3d 1517 (9th Cir. 1993), the Ninth Circuit held that an individual participant had no remedy under ERISA when a fiduciary knowingly misrepresented the terms of the plan to a participant. State law claims were preempted.

(3) In Sokol v. Bernstein, 803 F.2d 536 (9th Cir. 1986), the Ninth Circuit held have individual claims for violations of ERISA fiduciary duties could not be brought under 29 U.S.C. § 1132(a)(3). State law claims were preempted.

(4) In Olson v. General Dynamics, 951 F.2d 1123 (9th Cir. 1991) (state law fraud claim preempted by ERISA) Ninth Circuit held that any "gap" created by the preemption of all state law claims and the absence of remedies under ERISA is the fault of Congress.

Because tens of millions of American workers depend upon ERISA to safeguard their benefits under welfare and benefit claim plans, it is extremely important that the question of whether any "gap" exists between the preemption of state law claims and the absence of traditional remedies against breaching fiduciaries be addressed head-on by the Supreme Court. Only with additional clarification will individual participants and fiduciaries alike know where they stand and be able to enforce and/or administer the law. Either a major problem exists with the language of the statute itself, or the statute is not being interpreted as intended by Congress. If ERISA is not interpreted to effectively safeguard employee benefits, then Congress has created

a law which permits ERISA fiduciaries to completely escape liability for fraud, knowing misrepresentations and negligent conduct via preemption of state law claims.

On the other hand, if McLeod is correct in arguing that the proper interpretation of § 1132(a)(3) substantially narrows or eliminates any gap between the preemption of state law claims and the relief provided by ERISA, then this Court needs to reverse the Ninth Circuit decisions. By interpreting § 1132(a)(3) to permit the federal courts to use their full equitable powers typically available in breach of trust cases, to the extent appropriate, this Court can restore the Court of Equity's traditional role in the conduct of fiduciary relationships and preserve the safeguards intended by Congress.

If this Court holds that individual participants may not bring claims for monetary relief resulting from breaches of fiduciary duty under ERISA, fiduciaries will be permitted and possibly encouraged to ignore the fiduciary standards in ERISA when dealing with individual participants. It is naive to believe that large employers, institutional fiduciaries and professional administrators are unaware that no remedies exist in the Ninth Circuit for individual participants to challenge their conduct. While most fiduciaries undertake their duties seriously and in good faith, others may have serious conflicts of interest which need closer review. It is impossible to assure full disclosure, fair claims adjustment and good faith conduct by fiduciaries without adequate remedies.

D. The Ninth Circuit Decision is Wrong.

The Ninth Circuit improperly interpreted § 1132(a)(3) to exclude individual claims for the benefit of

a participant and all forms of compensatory damages.[2]

The position of the Ninth Circuit is not based upon any reasonable construction of the statutory language in § 1132(a)(3). The court followed Sokol v. Bernstein, 803 F.2d 536 (9th Cir. 1986) which simply applied this court's analysis of §§ 1109(a) and 1132(a)(2) in Massachusetts Mutual v. Russell, to § 1132(a)(3) without any independent analysis of the differences in the statutory language. There would be no need for § 1132(a)(3) to exist if its only purpose was to duplicate another provision in the same statute. Also, the Ninth Circuit has made no attempt to determine the proper scope of the phrase "appropriate equitable relief" but has simply relied on the assumption that all "extra-contractual" and all "monetary" relief are excluded by the statute. As discussed below, such blanket exclusions of compensatory or monetary damages have never defined the limits of the types of relief which a court of equity might find appropriate in a particular case.

An analysis of the statutory language of § 1132(a)(3) and the principles of equitable jurisdiction demonstrate that the Ninth Circuit erred in affirming the District Court's granting of the Defendant's motion for summary judgment with respect to Plaintiff's ERISA claims.

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[2] As the basis for its holding, the court in McLeod relied upon Sokol v. Bernstein, 803 F.2d 536, 558 (9th Cir. 1986) ("ERISA grants no private right of action by a beneficiary qua beneficiary"); Olson v. General Dynamics Corp., 960 F.2d 1418, 1424 (9th Cir. 1991) ("ERISA plaintiffs may not recover extra-contractual damages") and Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1528 (9th Cir. 1993 ("equitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. § 1132(a)(3)").

The following opinions of this court are instructive in interpreting § 1132(a)(3) and suggest that the decision of the Ninth Circuit is erroneous.

(1) In Massachusetts Mutual Life Ins. Co. v. Russell, 471 U.S. 724, 105 S.Ct. 3085 85 L.Ed.2d 96 (1985), the opinion of the Court (Justice Stevens) held that an individual claim for extracontractual relief could not be brought under § 1132(a)(2) and § 1109(a). The Court expressly disclaimed any consideration of § 1132(a)(3) in reaching its decision. Russell, supra, 105 S.Ct. at 3088 N.5.

In a concurring opinion in Russell, Justice Brennan (joined by Justices White, Marshall and Blackman) outlined an approach for the courts to take in construing the "appropriate equitable relief" provision of ERISA. Justice Brennan noted that:

> "Trust-law remedies are equitable in nature and include provisions of monetary damages. . . . Thus while a given form of monetary relief may be unavailable under ERISA for other reasons . . . it cannot be withheld simply because a beneficiary's remedies under ERISA are denominated as 'equitable.'" Russell, supra, 105 S.Ct. at 3097 (1985) N.10 (Citations omitted).

To answer the question of whether extra-contractual damages might be one form of "other appropriate equitable relief" under § 1132(a)(3), Justice Brennan suggested that:

> ". . . [C]ourts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the

benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies. * * *" Russell, supra, 105 S.Ct. at 3098.

Under the common law of trusts, a beneficiary is entitled to a make-whole type of remedy "which will put him in a position in which he would have been if the trustee had not committed the breach of trust." Restatement (Second) of Trusts, § 205 and Comment a. (1959). See also 3 A. Scott, Law of Trusts, § 199, p. 1638 (1967) and Bogert, Trusts and Trustees, § 862.[3]

(2) In Firestone Tire & Rubber Co. v. Bruch, 498 U.S. 101, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989), the U.S. Supreme Court reiterated that Congress intended to codify and make applicable to ERISA fiduciaries principles developed in the evolution of the common law of trusts. In determining the appropriate standard for review of actions under § 1132(a)(1)(B), the Court stated that it was guided by the principles of trust law and it rejected an interpretation of the statute which would have provided less protection to employees and beneficiaries than was available before ERISA was enacted. Firestone, supra, 109 S.Ct. at 954-956. The principles of trust law should be applied to determine the scope of the types of "appropriate equitable relief" available under ERISA to remedy a breach of fiduciary duty.

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Bogert, § 862 states: "In suits to collect money from a trustee for breach of trust, the direct damages will usually be measured by the difference between the value of the beneficiary's rights to principal and income before and after the breach, but consequential damages may also be awarded and exemplary or punitive damages may be awarded where malice or fraud is involved." (Emphasis added).

(3) In Ingersoll-Rand Co. v. McClendon, 498 U.S. 113, 111 S.Ct. 478 112 L.Ed.2d 474 (1990), the Court determined that a state common law claim for unlawful discharge to prevent the attainment of benefits under an ERISA plan was preempted by ERISA. The plaintiff, McClendon, sought compensatory damages for future lost wages and mental anguish and punitive damages under the state law tort claim. In determining that the state law claims were preempted, the Court noted with "particular relevance" that a civil action could be brought by a participant to obtain other appropriate equitable relief to redress violations of ERISA under § 1132(a)(3) and that the federal courts had exclusive jurisdiction of such civil actions under § 1132(a)(1). Justice O'Conner, for the unanimous court,[4] then noted that:

> ". . . [T]here is no basis in § 502(a)'s [29 U.S.C. § 1132(a)] language for limiting ERISA actions to only those which seek pension benefits. It is clear that the relief requested here is well within the power of federal courts to provide." McClendon, supra, 111 S.Ct. at 486.

The relief requested was future lost wages, plus mental anguish and punitive damages. The statement that the compensatory and punitive relief requested in McClendon is within the power of the federal courts to provide is consistent with the results and reasoning in the Russell, Firestone and Mertens decisions. In Russell, the Court did not decide what claims could be brought or what relief is available under § 1132(a)(3). In Firestone,

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[4] The Eleventh Circuit has refused to interpret Justice O'Conner's statements for the court to mean that the remedies of lost future wages, mental anguish and punitive damages were necessarily available under ERISA. McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821. Fn. 7 (1991).

the Court recognized the protections provided by the common law of trusts. In Mertens, the Court limited the types of available claims by holding that joint and several liability was not available against a nonfiduciary who acted with a fiduciary in breach of its duties. The Court indicated that a broader interpretation of the available remedies could be available under other circumstances to be determined in each case. In McClendon, the Court indicated that compensatory and punitive damages could be available under ERISA for statutory violations.

Thus, in determining the scope of "appropriate equitable relief" the first question should be whether a court of equity would traditionally have granted relief under the circumstances presented. If so, then the same types of "appropriate equitable relief" should also be available under § 1132(a)(3). Equitable relief would not be available to the extent a plain, adequate and complete remedy at law existed.

Once equitable jurisdiction has attached, courts of equity have endeavored to provide complete relief.[5] In this instance, complete relief for Petitioner would include a remedy of compensatory damages which are not available at law because of the preemptive effect of ERISA and because of the traditional jurisdiction over trust relationships. The Supreme Court in Mertens stated that the types of relief typically available in courts of equity continue to be available. There is nothing in

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[5] Two of the fundamental principles or maxims of equity are that:

(1) Equity regards that as done which ought to be done; and

(2) Equity will not suffer a wrong without a remedy.

ERISA or its statutory history to indicate that Congress intended that the Federal Court's equitable jurisdiction or power to grant equitable relief should be abdicated in any way. The traditional equitable principle of providing complete relief should also apply. To this end, the Supreme Court has indicated that damages for mental anguish are available under § 1132(a)(3). Ingersoll-Rand v. McClendon, 498 U.S. 113, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The Court's decision in Mertens did nothing to retract the previous statements.

E. Unanswered Questions Remain Following Mertens v. Hewitt Associates.

In Mertens v. Hewitt Associates, 508 U.S. ___, 113 S.Ct. 2063, 2068-2069, 124 L.Ed.2d 161 (1993), this Court in a 5-4 decision held that a nonfiduciary could not be joint and severally liable under ERISA for participating in a breach of a fiduciary duty because monetary relief was unavailable against a nonfiduciary under 29 U.S.C. § 1132(a)(3). The question remains whether the result and the types of relief available under § 1132(a)(3) would be different if the defendant is a fiduciary in breach of its duty.

In the case of a professional negligence action against a nonfiduciary, "equitable relief can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." However, the phrase "appropriate equitable relief" in § 1132(a)(3) may be interpreted either broadly or narrowly "but it remains a question of interpretation in each case which is intended." Mertens, supra 113 S.Ct. at 2068-2069. (Emphasis in original).

The question of whether "appropriate equitable relief" includes those categories of relief that were "typically available in equity" for a fiduciary's breach of duty (such as "make-whole" types of compensatory relief and other relief under the "equitable clean-up" doctrine) was left unanswered in Mertens.

This Court should now grant a Writ of Certiorari to provide a uniform answer to whether "appropriate equitable relief" includes surcharging a negligent fiduciary to recover losses resulting from the breach and compensatory emotional distress damages under the "equitable clean-up" doctrine.

F. The Need for a Uniform Test.

The courts have used a variety of terms and tests to attempt to formulate a workable standard for determining whether relief requested in a particular case is within the scope of "appropriate equitable relief" available under 29 U.S.C. § 1132(a)(3). This court, in Mertens stated that: "equitable relief" can mean whatever relief a court of equity is empowered to provide or it can also refer to those categories of relief that are typically available in equity, but it remains a question of interpretation in each case which is intended. The court went on to hold that nonfiduciaries are not joint and severally liable for breaches of fiduciary duty under ERISA. Additional clarification of the phrase "appropriate equitable relief" is necessary for the lower courts to determine whether or not the type of relief requested in a particular case is available under the statutory language.

Previous cases have suggested a number of different approaches or tests, but no test has been uniformally adopted and none are without significant

problems. A need exists for a uniform standard which can be applied by all of the lower courts to analyze the requested relief in a particular case and determine whether or not it is available under § 1132(a)(3). The existing tests which have been suggested or applied by various courts and some of their respective weaknesses include the following:

F.(1) Contractual v. Extra-Contractual Relief. Extra-contractual relief is the terminology used in Russell v. Massachusetts Mutual Life Ins., Co., 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) to analyze whether emotional distress damages were available under 29 U.S.C. § 1109(a) and § 1132(a)(2). This Court determined that the relief available under §§ 1109(a) and 1132(a)(2) was limited to relief which benefits the plan and not individual participants. The court expressly disclaimed any determination of the types of relief available under § 1132(a)(3).[6]

The contractual v. extra-contractual terminology should be abandoned because it does not address the statutory standard and does not provide a meaningful framework to provide assistance to litigants or the lower courts in future cases.

F.(2) Legal Relief v. Equitable Relief. "Legal" v. "equitable" relief is the basic distinction which was used by this Court in Mertens to determine that nonfiduciaries could not be held joint and severally liable under ERISA. However, the court in Mertens recognized that courts of

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Massachusetts Mutual Life Ins. Co. v. Russell, 471 U.S. 724, 105 S.Ct. 3085, 3088, 85 L.Ed.2d 96 (1985). Note 5 states: "Because respondent relies entirely on § [1109(a)], and expressly disclaims reliance on § [1132(a)(3)], we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages."

equity can sometimes grant "legal relief" and that a determination would have to be made in each particular case. The Court recognized the broad range of possible interpretations of the term "equitable relief" in the following statement:

> "At common law, however, there were many situations - not limited to those involving enforcement of a trust -- in which an equity court 'could establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.' 1 J. Pomeroy, Equity Jurisprudence, § 181 p. 257 (5th ed. 1941). The term 'equitable relief' can assuredly mean, as petitioners and Solicitor General would have it, whatever relief a court of equity is empowered to provide in the particular case at issue. But as indicated by the foregoing quotation -- which speaks of 'legal remedies' granted by an equity court -- 'equitable relief' can also refer to those categories of relief that are typically available in equity (such as injunction, mandamas, and restitution, but not compensatory damages). As memories of the divided bench, and familiarity with its technical refinements, recede further into the past, the former meaning becomes, perhaps, increasingly unlikely; but it remains a question of interpretation in each case which is intended." Mertens, supra, 113 S.Ct. at 2068-2069 (emphasis in original).

Because the types of remedies available to a court of equity have traditionally been those remedies necessary to provide complete relief and correct the wrong, it is not historically correct to simply assume or state that equitable relief does not include types of relief which we now consider to be "legal relief". The federal courts have

frequently recognized the ability of a court of equity to grant monetary relief.[7]

Courts of equity have traditionally granted monetary relief to recover losses resulting from a breach by a trustee. See Restatement (Second) of Trusts, §§ 197, 199, and 205. Technically, the equitable remedy for surcharging a breaching fiduciary is called an "equitable debt"[8] which may be enforced by the exercise of the

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Albermarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 28 (1975); Board of Com'rs. of Jackson County, Kan. v. United States, 308 U.S. 343, 60 S.Ct. 285, 288 (1939) ("In ordinary suits where the government seeks . . . to enforce a money claim ultimately derived from a federal law * * * the court has drawn upon those flexible considerations of equity which are established sources for judicial law-making."); Porter v. Warner Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) ("Where . . . the equitable jurisdiction of the court has properly been invoked . . . the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960) (Monetary recovery permitted pursuant to the power of equity to provide complete relief."); Goldberg v. Medtronic, Inc., 686 F.2d 1219, 1229 (7th Cir. 1982) ("The District Court, acting in equity, has the discretionary power to fashion a remedy to do complete justice, including a monetary award if necessary."); Hoelzer v. City of Stanford, Connecticut, 972 F.2d 495, 498 (2nd Cir. 1992) (Affirming the award of $557,200.00 damages as "equitable relief"); Walters v. Marathon Oil Co., 642 F.2d 1098, 1100 (7th Cir. 1981).

8

The existence of an equitable debt as a remedy for breach of trust has long been recognized. Pomeroy describes the personal liability of a trustee as follows:

> "* * * [t]he trustee incurs a personal liability for a breach of trust by way of compensation or indemnification which becomes the only remedy whenever the trust property has been lost or put beyond his reach by the trustee's wrongful act. The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself. The amount of the liability is always sufficient for the complete indemnification

court's personal jurisdiction over the trustee and the court's contempt powers.[9]

The courts of equity have traditionally exercised jurisdiction over trust matters because the trust relationship is considered to be a primary right subject to equitable jurisdiction and not simply because of any unique remedy available only in the courts of equity.[10]

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and compensation of the beneficiary." 1 J. Pomeroy, Equity Jurisprudence, § 1080, p. 229-230 (5th ed. 1941) (emphasis added).

Pomeroy further distinguishes between a legal debt and an equitable debt as follows:

> "A debt, in its most general conception, is a personal liability for a definite sum of money, arising out of contract, express or implied, or obligation in the nature of contract. The debtor is one who is personally liable for the payment of such sum, and from whom payment can be enforced by means of a personal pecuniary judgment. If the debt is recognized by the law, and can be recovered by an action at law, it is a legal debt; if it is only recognized by equity, and not by the law, and can only be recovered in a suit of equity, the debt is equitable. * * *." 3 J. Pomeroy, Equity Jurisprudence, § 1298, p. 863 (5th ed. 1941) (emphasis in original).

9

One year prior to the enactment of ERISA, Professor Dobbs in his treatise on remedies specifically observed that "sometimes equity courts have occasion to issue money decrees" and that they may be enforced as in persona orders in contrast to judgments of law. D Dobbs, Remedies, § 2.8, p. 92 (1973).

10

Equity is not simply a system of remedies but rather both a system of primary rights and duties and a system of remedies:

> "In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or if it be a remedy which may also be given by a court of law, it

Once a court of equity has assumed jurisdiction over a matter, it has traditionally granted any type of relief which is necessary to provide complete relief to remedy the wrongs.[11]

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must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable rules of procedure." 1 Pomeroy's Equity Jurisprudence, Section 130 (5th Ed. 1941). (Emphasis in original).

"* * * The traditional view is that equitable relief is denied unless the matter is one in which equity historically developed the substantive law (as in the case of trusts), or the matter is one in which the plaintiff's remedy at law is inadequate. * * *." D. Dobbs, Remedies, § 2.5, p. 57 (1973). (Emphasis added).

Jurisdiction over trusts and trustees has always been regarded as equitable:

"The rights and duties of the parties growing out of contracts, and especially those growing out of certain determinate relations not based upon contract, but directly concerned with the property, such as trustee and cestui que trust and all its forms . . . constitute a large and important part of the primary rights falling under the equitable jurisdiction." 1 Pomeroy's Equity Jurisdiction, Section 100.

11

While a court of equity would not normally entertain a suit for compensatory damages, such relief is appropriate when no adequate remedy at law exists and the plaintiff is entitled to other equitable relief. Professor Dobbs refers to this as the "equitable clean up" doctrine because it allowed equity to dispose of the entire matter, including the legal issues. D. Dobbs, Remedies, § 2.7, p. 83 (1973) (". . . the chancellor who granted equitable relief had jurisdiction to go on and grant damages as well, as a matter of economy of litigation").

While compensatory damages for emotional distress are the classic form of legal relief, they may also become appropriate equitable relief when no adequate remedy at law exists to provide complete relief. See D. Dobbs, Remedies, § 2.5, p. 57 (1973) (if plaintiff would be required to bring both a legal claim and an equitable claim to obtain complete relief equity will hear both claims to avoid a multiplicity of suits).

See also Restatement (Second) of Torts, § 874, Comment b (1979) ("Violation of Fiduciary Duty"), although "[t]he remedy of a beneficiary

The statutory language in § 1132(a)(3) limits the types of equitable relief available to "appropriate equitable relief". The court in Mertens noted that the phrase "equitable relief" had to mean something less than all relief in order to give meaning to the use of the word "equitable" in the statute. However, it must be noted that only "appropriate" equitable relief may be provided. By placing emphasis on the word "appropriate", the types of available relief are adequately limited without having to place any artificial or inaccurate limitations or the types of relief which could be granted by a court of equity.

The entire phrase "appropriate equitable relief" should be limited to those categories of relief which a court of equity would consider appropriate to provide complete relief to remedy a wrong in a particular case. Such an interpretation would then permit the parties and the courts to utilize the extensive common law which defines and limits equitable jurisdiction to determine types of relief which are appropriate. If a court of equity would not have exercised jurisdiction or provided relief in a particular case, then it would not be available under ERISA as "appropriate equitable relief." For example:

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against a defaulting or negligent trustee is ordinarily in equity,' the beneficiary is entitled to all redress 'for harm caused by the breach of a duty arising from the relation').

The rules of equity practice for the federal courts recognized that while equity would not hear cases which have originally been brought by the law side of the court, once equity acquired jurisdiction, complete relief would be provided. Compare: Federal Equity Rule 22 ("If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, it should be forthwith transferred to the law side and be there preceded with, with only such alteration in the pleadings as shall be essential."); with Federal Equity Rule 23 ("If in any suit in equity a matter ordinarily determinable at law arises, such matters may be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.") See Federal Rules of Equity Practices, 108 U.S. 573, 586 (1884).

(a) A court of equity would not have exercised jurisdiction to award damages in Mertens because it was a professional malpractice action involving a nonfiduciary and an adequate remedy at law already existed; and (b) A court of equity could exercise jurisdiction and order a trustee in breach of its duties to pay damages resulting from the breach because the fiduciary relationship involves a primary right traditionally supervised by the equity courts.

F.(3) Monetary v. Non-Monetary Relief.

Some courts have tried to define "equitable relief" based upon whether or not the requested relief is "monetary" relief. While some equitable remedies (i.e., constructive trusts, injunction and mandamas) were only available in courts of equity, equitable relief has never been limited to these non-monetary forms of relief.[12] Whether the type of relief is referred to as monetary, pecuniary or compensatory, courts of equity have traditionally provided for the payment of money as a form of equitable relief.[13]

12

Pomeroy provides a non-exclusive list of ten classes of remedies (including "pecuniary compensation") which can be provided by courts of equity. See 1 J. Pomeroy, Equity Jurisprudence, § 112 (5th ed. 1941). Assuming these "classes" are the equivalent of "categories of relief typically available in equity," mentioned in the Mertens decision, there should be no argument that remedies of pecuniary compensation are available in equity and courts need only determine which, if any, of the classes of remedies are "appropriate" for the circumstances of a particular case.

13

Pomeroy describes the equitable "remedies of pecuniary compensation" as follows:

> "7. Remedies of pecuniary compensation, are those in which the relief consists in the award of a sum of money. These remedies, whose final object is the recovery of money, are of three distinct species, which differ considerably in their external form and

In addition to being a system which provides unique remedies, the equity courts have also defined and supervised primary rights, such as the trust relationships.[14] When a breach of trust occurs, it was traditionally the court of equity which supervised the conduct of the trustee and had the ability to surcharge the trustee for losses resulting from any breach.[15] The fact that courts of

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incidence, but which agree in their substance, - in the intrinsic nature of the final relief. They are the following: First. Those in which the relief consists simply in the recovery of a general pecuniary judgment; that is, a judgment to be enforced or collected out of the debtor's property generally, - any property which he may own is liable to be taken in satisfaction. This simple pecuniary recovery is, in the vast majority of cases, legal, and not equitable, but it is not unknown in equity. A court of equity occasionally grants the relief of compensatory damages in connection with some other specific relief (see Section 237), and under very peculiar circumstances it decrees the payment of damages alone. Several kinds of equitable suits are only pecuniary in their relief, as those for contribution and exoneration. Secondly. Those cases in which the relief is not a general pecuniary judgment, but is a decree of money to be obtained and paid out of some particular fund or funds. The equitable remedies of this species are many in number and various in their external forms and incidents. * * * Thirdly. There is also another species of pecuniary remedies, closely analogous to the last, and differing from it only in the additional element of a distribution of a final pecuniary award among two or more parties having claims either upon one common fund or upon several funds. The final relief in all these cases is simply pecuniary; the amounts to which the different parties are entitled are ascertained, and are obtained by distribution of the fund or funds upon which they are chargeable. * * *" 1, Pomeroy's Equity Jurisprudence, Section 112 (5th Ed. 1941).

14

See footnote 10, supra.

15

See Restatement (Second) of Trusts, §§ 197, 199 and 205 which read as follows:

"§ 197. Nature of Remedies of Beneficiaries. Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable."

equity may provide monetary relief has been frequently recognized by this court both in its decisions and its rules.[16]

"§ 199. Equitable Remedies of Beneficiary. The beneficiary of a trust can maintain a suit

(a) to compel the trustee to perform his duties as trustee;
(b) to enjoin the trustee from committing a breach of trust;
(c) to compel the trustee to redress a breach of trust;
(d) to appoint a receiver to take possession of the trust property and administer the trust;
(e) to remove the trustee."

"§ 205. Liability in Case of Breach of Trust. If the trustee commits a breach of trust, he is chargeable with

(a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
(b) any profits made by him through the breach of trust; or
(c) any profit which would have accrued to the trust estate if there had been no breach of trust."

16

The following are examples of this Court's recognition that a decree in equity may be for the payment of money:

(1) In Clews v. Jamieson, 182 U.S. 461, 21 S.Ct. 845, 852, 45 L.Ed. 1183 (1901), the Court adopted the views of Pomeroy in describing both the scope of equitable jurisdiction over fiduciaries and the scope of equitable relief which includes monetary relief:

"* * * The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, but being merely recoveries of money. * * *.' 1 Pom. Eq. Jur., § 158. (Emphasis added).

The Federal Rules of Equity Practice specifically contemplated the payment of money as part of an equity decree.[17]

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(2) See also Porter v. Warner Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) ("Where . . . the equitable jurisdiction of the court has properly been invoked . . . the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law."); Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332 (1960) (Monetary recovery permitted pursuant to the power of equity to provide complete relief).

(3) The United States Supreme Court's rules prior to 1954 recognized the appropriateness of monetary relief as part of an equity decree prior to the merger of the law and equity courts. Rule 30 of the Revised Rules of the Supreme Court of the United States, 306 U.S. 685 (1939), provided:

"Rule 30. INTEREST AND DAMAGES

"1. Where judgments for the payment of money are affirmed and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. * * *

3. Paragraphs 1 and 2 of this rule shall be applicable to decrees for the payment of money in cases in equity, unless otherwise specially ordered by this court. * * *." (Emphasis added).

(4) Substantially similar language which specifically referred to "the payment of money in cases of equity" existed as Rule 23 in the Rules of the Supreme Court of the United States from 1884 until 1939. 108 U.S. 573 (1884). For prior versions of the rule referring to "the payment of money in cases of equity . . ." see 210 U.S. 441, 490 (1873) and 21 How. xiii (1858).

17

The Rules of Federal Equity Practice stated, in part:

Any attempt to limit "appropriate equitable relief" to non-monetary forms of relief fails to recognize the historical realities of the types of relief available to a court of equity. In addition, any artificial distinction will only raise new issues concerning whether forms of restitution, constructive trusts, equitable liens, equitable debts, etc., are monetary or non-monetary forms of relief. The courts of equity did not historically make this type of distinction and lower courts will need to start over from a clean slate, rather than having the ability to rely on the existing common law to determine whether a particular form of relief requested in a specific case is available under ERISA.

G. The Federal Courts Must Guard Their Constitutionally-Granted Power to Grant Equitable Relief.

There is no indication that Congress intended to limit the federal courts' power to apply the full scope of the remedies available pursuant to the equitable powers of the court:

> "The general rule is that absent clear direction to the contrary by Congress, the federal

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"Rule 8. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of assumpsit. * * *." 210 U.S. at 511 (1884). (Emphasis added).

"Rule 92. That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this Court regulating the equity practice, where the decree is solely for the payment of money." 210 U.S. at 540-541. (Emphasis added).

courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028, 1035 (1992).

In the absence of a clear congressional mandate, this Court should not selectively abdicate any of the court's equitable powers to grant relief.

> ". . . [S]elective abdication . . . would harm separation of powers principals in another way, by giving judges the power to render futile causes of action authorized by Congress through a decision that no remedy is available." Franklin, supra, 112 S.Ct. at 1037. (Emphasis added).

To avoid rendering the fiduciary duties of ERISA futile when applied to individual participants, courts must "resume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." Davis v. Passman, 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979); Franklin v. Gwinnett County Public Schools, 112 S.Ct. 1028, 1032 (1992). It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the legislative purpose." J.I. Case Co. v. Borak, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964).

Under § 1132(a)(3), Congress expressly provided a cause of action to participants to redress violations of ERISA. Congress also provided for "appropriate equitable relief." It must be assumed that Congress was familiar with the common law of trusts and the principles of equity jurisdiction and with the existing precedent

regarding the types of relief which could be awarded by courts of equity.[18]

Failure by the Courts to utilize their full equitable powers granted by Congress to redress violations of ERISA by fiduciaries may violate the separation of powers by rendering causes of action authorized by Congress futile through decisions that no remedy is available.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED this 29th day of June, 1995.

Respectfully submitted,

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October 1994

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[18] See, Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 1958, 60 L.Ed.2d 560 (1979) ("It is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedence from this and other federal courts in that it expected its enactment to be interpreted in conformity with that.").

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FILED
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAMELA J. McLEOD, Plaintiff-Appellant, v. OREGON LITHOPRINT, INC., an Oregon corporation, dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN; Defendants-Appellees.	) No. 92-36928) D.C. No. CV-92-00450-MFM) ORDER

Before: ALARCON, NORRIS, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Leavy has voted to reject the suggestion for rehearing en banc, and Judges Alarcon and Norris have so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAMELA J. MCLEOD,
Plaintiff-Appellant,

v.

OREGON LITHOPRINT INC., an Oregon corporation, dba News-Register Publishing Co.; and NEWS-REGISTER EMPLOYEES' INSURANCE PLAN;
Defendants-Appellees.

No. 92-36928
D.C. No. CV-92-00450-MFM
OPINION

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
May 3, 1994—Portland, Oregon

Filed February 1, 1995

Before: Arthur L. Alarcon, William A. Norris, and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

Labor and Employment/ERISA/Health Care Coverage

The court of appeals affirmed in part a district court judgment, reversed in part and remanded. The court held that an

employee was precluded from recovering damages for her claim that an Employee Retirement and Income Security Act (ERISA) plan administrator breached a fiduciary duty by failing to timely notify her of her eligibility to apply for cancer coverage.

Appellant Pamela McLeod worked for appellee Oregon Lithoprint Inc, which was doing business as New-Register Publishing Co. After her physician told her she had cancer on July 19, 1990, McLeod applied for cancer insurance coverage under appellee the News-Register Employees' Insurance Plan. Such coverage was available from American Family Life Insurance Co. (AFLAC). She was denied coverage after AFLAC discovered she had a previous cancer diagnosis.

McLeod brought claims against Oregon Lithoprint and the Plan under the ERISA. She claimed that the ERISA plan administrator breached a fiduciary duty under 29 U.S.C. § 1104(a) by failing to notify her that effective May 1, 1990, she had become eligible to apply for cancer insurance coverage from AFLAC. She argued that the News-Register did not inform her of the opportunity to apply for the coverage until July 1990. She sought compensatory damages equal to the benefits that would have been paid to her had she elected coverage under the cancer policy. She also sought compensatory damages for emotional distress and statutory damages for the defendants' alleged failure to respond to her previous request for plan documentation. Oregon Lithoprint and the Plan argued that even if they failed to notify McLeod timely about the existence of a cancer insurance policy, she could not recover monetary damages under the ERISA because she was not a plan "participant."

The district court held that McLeod was not a "participant" or "beneficiary" with respect to the cancer coverage and therefore lacked standing to bring an ERISA claim against her employer for breach of fiduciary duties or failure to provide

plan documents. The court granted the defendants' motion for summary judgment. McLeod appealed.

[1] In determining whether McLeod is a "participant," the analysis focused on her status of employment, not whether cancer coverage was a distinct plan or a benefit program. The fact that she was not issued an actual policy did not preclude her from being a participant. [2] McLeod argued that she was eligible *to apply* for benefits on May 1, 1990, and that she was eligible *to receive* benefits, had she applied for them by the time she was diagnosed with cancer. Thus, her employment status clearly rendered her a participant. She presented a "colorable claim" that she would prevail in a suit for benefits resulting from an alleged breach of fiduciary duty. She had standing.

[3] The Supreme Court has held that recovery for breach of fiduciary duty under 29 U.S.C. § 1109(a) must inure to the benefit of the plan as a whole. [4] In addition, the Ninth Circuit previously held that where a fiduciary breaches the plan's terms, the ERISA accords beneficiaries the right to sue "on behalf of the entire plan." [5] In this case, McLeod did not seek to recover for the plan as a whole. Instead, she requested money damages for herself as the potential beneficiary. Therefore, she was precluded from recovering damages for the claim that the defendants breached a fiduciary duty pursuant to § 1104(a)(B).

[6] Because McLeod was a participant, she may be entitled to receive statutory damages for the administrator's alleged failure to provide the required plan documentation. [7] The issue of whether she is entitled to statutory damages for the administrator's failure to provide her with "plan" documents was remanded.

COUNSEL

Leslie L. Wellman, Wellman & Murray, Portland, Oregon, for the plaintiff-appellant.

Wade R. Keenon and William H. Mitchell, Mitchell, Lang & Smith, Portland, Oregon, for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

The appellant, Pamela J. McLeod ("McLeod"), appeals from summary judgment on her claims pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1371 (West Supp. 1994). McLeod argued before the district court that the ERISA plan administrator breached a fiduciary duty under 29 U.S.C. § 1104(a)[1] by failing to notify her that effective May 1, 1990, she had become eligible to apply for cancer insurance coverage from American Family Life Insurance Company ("AFLAC"). She contends that her employer, the News-Register of McMinnville, Oregon, did not inform her of this opportunity until July 1990. On July 19, 1990, before she was notified of the opportunity to obtain cancer coverage, McLeod's physician told her she had cancer. McLeod applied for cancer coverage on July 24, 1990. The application was granted but later rescinded when the insurance company discovered that McLeod had a previous cancer diagnosis. McLeod seeks an award of compensatory damages equal to the benefits that would have been paid to her had she elected coverage under the cancer policy. McLeod prays for compensatory damages for emotional distress in

[1]In relevant part, section 1104(a)(1)(B) provides for a "prudent man" standard of care:

> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

the amount of $100,000. She also seeks statutory damages for the appellees' failure to respond to her request for the plan documentation.

Oregon Lithoprint Inc., dba News-Register Publishing Company, and the News-Register Employees' Insurance Plan argued that, as a matter of law, even if they failed to notify McLeod timely about the existence of a cancer insurance policy, she could not recover monetary damages under ERISA because she was not a plan "participant." Both parties agreed that the issue of whether McLeod was a plan "participant" as defined by ERISA was a legal question for the district court to resolve.

The district court held that McLeod was not a "participant" or "beneficiary" with respect to the cancer coverage and therefore that she "lacks standing to maintain an ERISA claim against her employer for breach of fiduciary duties or failure to provide AFLAC plan documents." The court also held that, even if McLeod had standing, she could not recover compensatory damages. The court granted defendant's motion for summary judgment. McLeod appealed.

DISCUSSION

I. *Whether McLeod Is a "Participant" Under an "Employee Benefit Plan" Subject to ERISA*

A major issue is whether McLeod was a "participant" in the cancer policy. Whether an employee is a participant in an ERISA plan is critical because it involves both standing and subject matter jurisdiction. *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986). The district court found that McLeod had no standing because she was not a participant.[2]

[2]The district court found that McLeod was not a "participant" or "beneficiary" with respect to the AFLAC cancer coverage and therefore, she "lack[ed] standing to maintain an ERISA claim against her employer

The appellees argue that McLeod is not a participant because, under the cancer plan, "it is a legal and factual impossibility for an employee to receive a plan benefit, or to be eligible for a plan benefit, *unless* there is an individual policy of insurance issued to that employee." The statutory definition of participation in an Erisa plan contradicts the appellee's conclusion:

> A civil action may be brought . . . by a participant . . . to recover benefits due to [her] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). A "participant" is defined as "any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7).

[1] In determining whether McLeod is a "participant," the analysis focuses on her status of employment, not whether cancer coverage was a distinct plan or a benefit program. The fact that McLeod was not issued an actual policy does not preclude her from being a participant. "[T]he term 'participant' is naturally read to mean either employees in, or reasonably expected to be in, currently covered employment." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (quotation omitted). In construing the phrase "may become eligible" in section 1002(7), the Supreme Court

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for breach of fiduciary duties or the failure to provide AFLAC plan documents." The district court based its decision on the following factors: (1) "participant" does not include potential claimants; (2) no cases were found in which a plaintiff premised an ERISA case on the failure to disclose the existence of an available policy; (3) the cancer policy was not part of the same plan under which McLeod received disability insurance; and (4) nothing in ERISA extends liability to a claim for coverage under a policy that was never validly issued.

states: "In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* at 117-18.

[2] McLeod's argument is that she was eligible *to apply* for benefits on May 1, 1990, and that she was eligible *to receive* benefits, had she applied for them by the time she was diagnosed with cancer. Thus, her employment status clearly renders her a participant. McLeod presents a "colorable claim" that she would prevail in a suit for benefits resulting from an alleged breach of fiduciary duty.[3] Because one of the two *Firestone* tests is met, McLeod is a participant and has standing. We reverse the district court on this issue.

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[3]The Sixth Circuit has held that:

> In determining who is a "participant," for purposes of standing, the definition found in 29 U.S.C. § 1002(7) must be read in the context of traditional concepts of standing, not in the context of adjudicating the ultimate issue of the merits of plaintiffs' claim that they are not receiving the full extent of the benefits to which they are entitled from the employee benefit plan . . . . The doctrine of standing is concerned with whether a person is the proper party to request adjudication of a particular issue, whether a person has alleged such a personal stake in the outcome of a justiciable controversy that [she] should be entitled to obtain its judicial resolution. Standing focuses on a person's effort to get [her] complaint before a court and not on the issue [she] wishes to have adjudicated.

Astor v. International Business Machs. Corp., 7 F.3d 533, 538 (6th Cir. 1993) (quoting *Hughes v. General Motors Corp.*, 852 F.2d 568 (6th Cir. 1988) (unpublished) (citations omitted), *cert. denied*, 489 U.S. 1081 (1989)); *accord Vartanian v. Monsanto Co.*, 14 F.3d 697, 701-02 (1st Cir. 1994).

II. *Whether McLeod May Recover for Breach of Fiduciary Duty Where No Recovery Is Sought for the Plan as a Whole*

McLeod argues there was a breach of fiduciary duty under section 404(a), 29 U.S.C. § 1104(a), which requires a fiduciary to exercise the standard of care a prudent person would exercise. *See* n.1, *supra*. For the appellees' alleged breach of fiduciary duty in failing to inform her of the cancer coverage, McLeod requests the following "equitable or remedial relief":

> (A) Surcharge of the Defendants as fiduciaries of the Plan in the amount of her unreimbursed expenses and other benefits which would have been reimbursed or provided under the Cancer Insurance Policy with prejudgment interest thereon;
>
> (B) An order requiring defendant to reimburse Plaintiff all further expenses of benefits which would have been provided under the Cancer Coverage; and/or
>
> (C) A declaratory judgment that Plaintiff is covered as an insured with Cancer Coverage under the Cancer Insurance Policy issued by Defendant AFLAC.

[3] The Supreme Court has held that a recovery for breach of fiduciary duty under section 404(a), 29 U.S.C. § 1109(a),[4]

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[4] 29 U.S.C. § 1109(a) states:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses *to the plan* resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

(Emphasis added.)

must inure to the benefit of the plan as a whole. *Russell*, 473 U.S. at 142. We have followed *Russell* to strictly limit the remedies available under ERISA. *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 (9th Cir. 1993); *Sokol v. Bernstein*, 803 F.2d 532, 536, 538 (9th Cir. 1986).

[4] In *Sokol*, we held: "ERISA grants no private right of action by a beneficiary *qua* beneficiary; rather, it accords beneficiaries the right to sue on behalf of the entire plan if a fiduciary breaches the plan's terms." *Id.* In doing so, we extended the Supreme Court's holding in *Russell*, which was limited to section 409(a), 29 U.S.C. § 1109(a) only, *see Russell*, 473 U.S. at 139 n.5, to section 503(a)(3), 29 U.S.C. § 1132(a)(3),[6] as well. We stated:

> *Russell* held that the fiduciary duties set forth in § 409 run only to the plan, and not to individual beneficiaries. In so holding, the *Russell* Court used language implying that *all* of the statute's provisions relating to fiduciary duties run only to plans, and not to . . . individuals.

Sokol, 803 F.2d at 535 (citation omitted).

McLeod argues that our decision in *Sokol* conflicts with the Supreme Court's opinion in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063 (1993). We disagree. After *Mertens* was decided, we

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[6]Section 503(a)(3), 29 U.S.C. § 1132(a)(3), states:

(a) *Persons empowered to bring a civil action*

A civil action may be brought —

. . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

reiterated that section 409(a) precludes claims unless they inure to the benefit of the plan as a whole rather than tc an individual. *Watkins*, 12 F.3d at 1528. We are bound by that decision.[6]

[5] McLeod does not seek to recover for the plan as a whole. Instead, she requests money damages pursuant to section 502(a)(3) for herself as the potential beneficiary. Consequently, McLeod is precluded from recovering damages for the claim that the appellees breached a fiduciary duty pursuant to section 1104(a)(B) for the failure to act with "the care, skill, diligence and prudence required of a fiduciary under ERISA."[7] *See Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1424 (9th Cir. 1991) (Reinhardt, J. concurring) ("[T]he federal courts have consistently ruled that ERISA plaintiffs may not recover extracontractual damages."), *cert. denied*, 112 S. Ct. 2968 (1992); *Johnson v. District 2 Marine Eng'rs Beneficial Ass'n, — Associated Maritime Officers, Medical Plan*, 857 F.2d 514, 518 (9th Cir. 1988) (finding no need to reexamine the holding of *Sokol* unless the Supreme Court indicates otherwise). We affirm the district court on this issue.

III. *Whether McLeod May Receive Compensatory Damages Under 29 U.S.C. § 1132(a)(3)*

McLeod argues that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a participant to bring a civil action to obtain "appropriate equitable relief" to redress violations of the fiduciary responsibility provisions of ERISA. She argues that the district court erroneously held that the compensatory

[6]We are unpersuaded by McLeod's citation of decisions from other circuits. Such decisions do not constitute a change in the law of this circuit. *See Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984) (only en banc decisions of this court, Supreme Court decisions, or subsequent legislation constitute changes in the law).

[7]The district court found: "Finally, I note that the remedy plaintiff seeks would be contrary to the overriding purpose of ERISA to protect *plans* as a *whole*, rather than individual participants."

damages that she requested in her first amended complaint were unavailable under ERISA. She also argues that, pursuant to 29 U.S.C. § 1132(a)(3), she is entitled to recover $100,000 in extra-contractual damages for emotional distress resulting from the failure to obtain cancer coverage.

Recent decisions by the Supreme Court and this circuit foreclose McLeod's arguments. "As the Supreme Court has recently held [in *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2068-70 (1993)], equitable relief in the form of the recovery of compensatory damages is not an available remedy under 20 U.S.C. § 1132(a)(3)." *Watkins*, 12 F.3d at 1520.

IV. *Whether Summary Judgment Was Proper on the Claim for Relief for Failure to Furnish Copies of the Plan Instruments*

McLeod claims that, notwithstanding whether she is entitled to compensatory damages, she is entitled to statutory damages.

ERISA provides in relevant part that:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

29 U.S.C. § 1024(b)(4). McLeod alleges that the appellee failed to comply with this section:

> On October 17, 1991, Plaintiff, through her attorneys, requested the following information from Defendant News-Register pursuant to 29 U.S.C. § 1024(b)(4):

> (A) the Plan document;
>
> (B) the Summary Plan Description;
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> (C) the Annual Report; and
>
> (D) any other instruments in effect under which the Plan was established or operated.

Defendant News-Register responded to Plaintiff's request for information on November 12, 1991, in a letter signed by Joyce Morrow, News-Register Controller. Morrow informed Plaintiff that Defendant News-Register did not have a Plan document, Plan description or an annual report for the Plan.

No. 92-450MA, First Amended Complaint, at 4, paras. 16 & 17.

[6] Because we conclude that McLeod was a participant, she may be entitled to receive statutory damages for the administrator's alleged failure to provide the required plan documentation:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c).

[7] The appellees note that McLeod was provided an employee handbook. The administrator also testified that it was their practice to notify participants of the cancer coverage. Both of these events are alleged to have taken place on April 24, 1990. In October 1991 McLeod asked for the plan in writing and was informed that none existed because the "plan" was represented exclusively by the AFLAC representatives. Both parties use the term "plan" and "policy" interchangeably to discuss the cancer coverage, which confuses the issue as to whether a plan document exists and was provided or not. We do not reach the subissue of whether the cancer coverage was a distinct plan or individual benefit program, as the facts are disputed as to whether the delivery of materials McLeod received constitutes compliance with the statutory requirements. We remand on the issue of whether the appellant is entitled to statutory damages for the administrator's failure to provide her with "plan" documents. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) (the court of appeals may resolve the issue only if the record permits but one resolution).

AFFIRMED in part and REVERSED in part. REMANDED for trial on the claim of failure to provide requested documents pursuant to 29 U.S.C. § 1024(b)(4). The parties shall bear their own costs on appeal.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAMELA J. McLEOD, Plaintiff, v. OREGON LITHOPRINT, INC., an Oregon corporation, dba News-Register Publishing Co., et al. Defendants.	Civil No. 92-450-MA OPINION

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MARSH, Judge.

Plaintiff, a full time employee of defendant News Register Publishing, filed this action under ERISA, 29 U.S.C. § 1132 et seq., alleging that her employer breached a fiduciary duty when it failed to timely notify her of her right to apply for cancer insurance.[1] Plaintiff became eligible, by reason of her length of employment, to apply for coverage on May 1, 1990, but contends that she was not informed of this opportunity until late July, approximately two weeks after she was diagnosed as having cancer. Plaintiff submitted an application for cancer coverage on July 24, 1990 which was granted and later rescinded when the insurance company discovered the previous cancer diagnosis. In addition, plaintiff asserts a claim for statutory damages under 29 U.S.C. § 1024(b)(4) alleging that defendants failed to respond to discovery requests for the cancer plan documentation.

Plaintiff now moves for summary judgment on her claims of breach of fiduciary duty and failure to provide requested plan information.[2] Plaintiff seeks an award of compensatory damages equal to benefits that would have been paid had she elected coverage under the cancer policy, submitted an application, been accepted and paid the premiums. Defendants contend that material issues

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There is no dispute that the employer, News Register, is an ERISA plan administrator and a "fiduciary" under ERISA.

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Plaintiff's claims against AFLAC, the insurance company which made the cancer policy available to News Register employees, and Bret Runolfson, AFLAC's agent, have been settled.

of fact exist regarding timely notice of the right to pursue cancer coverage and whether they adequately complied with discovery requests. However, defendants seek summary judgment against plaintiff's ERISA claims arguing that, as a matter of law, even if they failed to notify plaintiff about the existence of cancer coverage in a timely manner, plaintiff cannot recover the monetary damages under ERISA because she is not a plan "participant" and is guilty of unclean hands.

Both parties agree that the issue of whether plaintiff is a plan "participant" as defined by ERISA is a legal question which should be resolved by the court with their submissions on these motions. For the reasons which follow, plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

DISCUSSION

1. Is Plaintiff a Plan "Participant?"

Section 1451(1) of title 29, the jurisdictional basis for an action under ERISA, provides that a "plan fiduciary, employer, plan participant or beneficiary who is adversely affected by the act or omission of any party under this subtitle . . . may bring an action for appropriate legal or equitable relief." Section 1132(a) outlines available civil remedies and provides that "[a] civil action may be brought -- (1) by a participant . . . -- (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Section 1002(7) defines a "participant" as "any employee or former employee of an employer .. who is or may

become-eligible to receive a benefit of any type from any employee benefit plan which covers employees of such employer."

In Firestone Tire & Rubber Co. v. Bruch, 109 S.Ct. 948 (1989), plaintiffs sought updated plan summary descriptions pursuant to 29 U.S.C. § 1024 against their former employer, Firestone, following the sale of Firestone's plastics division to another company. The district court denied the requested relief finding that plaintiffs were no longer plan "participants." The Third Circuit Court of Appeals reversed, holding that the right to request and receive information "extends both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not." Id., at 952, citing 828 F.2d 134, at 153. The Supreme Court reversed the Third Circuit's holding, finding that the court's interpretation of the term participant to include potential claimants, "strays too far from the statutory language." Id., at 957. Under the Supreme Court's formulation, "participants" are only those employees for former employees who have a "colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Id., at 958. In a concurrence, Justice Scalia took this definition one step further:

"I think that, properly read, the definition of 'participant' embraces those whose benefits have vested, and those who (by reason of former employment) have some potential to receive the vesting of benefits in the future, but not to those who have a good argument that benefits have vested even though they have not."

Id., at 959 (emphasis added).

Prior to the Supreme Court's decision in Firestone, the Ninth Circuit made a similar holding in a case filed by former employees who had already received their vested benefits in a lump sum payment who filed an action against the plan administrator for breach of fiduciary duties and failure to disclose relevant plan documents. Kuntz v. Reese, 785 F.2d 1410 (9th Cir. 1986). In Reese, the court held that plaintiffs were not "participants" as defined by § 1002(7) because "if successful, the plaintiffs' claim would result in a damage award, not in an increase of vested benefits." Id., at 1411. The court reasoned that Congress did not intend to convert claims of all types into "potential benefits" within the meaning of ERISA. Id., at 1412.

Section 1104 governs duties owed by a fiduciary to "participants and beneficiaries" and directs that fiduciaries act with care in providing benefits, diversifying investments and defraying all reasonable expenses in administering the plan. Section 1021 mandates that the plan administrator provide a summary plan description to "each participant covered under the plan and to each beneficiary who is receiving benefits under the plan." Thus, if plaintiff is a "participant" or plan "beneficiary," defendants had a duty to provide her with a description of the plan "with care." Conversely, there is no authority imposing a duty of care upon fiduciaries with respect to any person who is neither a plan participant nor beneficiary. See e.g. Alton Memorial v. Metropolitan Life Ins., 656 F.2d 245, 249 (7th Cir. 1981) (employer owes no duty to plan actuary).

The parties have not cited, nor have I been able to find, any case in which a plaintiff has premised an ERISA claim on a failure to disclose the existence of an available policy. Decisions under ERISA for non-disclosure usually address issues related to claims filed by persons who elect

coverage and thereafter contend that a fiduciary failed to disclose a change in benefits or an aspect of the benefit package which resulted in a reduction in anticipated benefits. For example, in Olson v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1992), plaintiff claimed he was misled about the amount of benefits he would receive following the change of ownership of his employer. The court noted that "at the time he filed this suit, Olson was receiving benefits from all three companies [and] . . . was therefore a participant in each company's employee benefit plan . . . " Id., at 1422. See also Greany v. Western Farm, No. 91-35098, slip op. 10519, at 10530 (9th Cir. Sept. 1, 1992) (plaintiffs must have received health benefits under policy to state claim for mistakes re date of termination for conversion policy) and National Co.'s Health v. St. Joseph's Hospital, 929 F.2d 1558 (11th Cir. 1991) (failure to notify employee about continuation coverage).

The undisputed evidence regarding the various benefit programs offered by defendants is that defendants offered three different health policies to all full time employees: a medical insurance policy with Blue Cross, a disability policy with Standard Insurance and the cancer policy with AFLAC. Each policy was optional and, if the employee elected coverage under one or all three policies, premiums were paid for by contributions from both the employee and the employer and were deducted from payroll. The AFLAC cancer coverage option was a separate individual policy issued to the employee.

The "personal choice account"[3] was clearly a "benefit plan" and is described as a benefit plan in the

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The parties and the plan summary also describe the personal choice account as a "cafeteria" or "flexible spending account plan."

summary plan description. However, the personal choice account did not offer medical benefits-- it was not a separate benefit program, but an optional method of payment. Employees who wished to pay for their share of the medical insurance premiums or cancer insurance premiums from before tax dollars could elect to make those payments via a "personal choice account." The personal choice account could not be used to pay for Standard's disability insurance premiums. The parties also do not dispute that plaintiff elected to apply and did obtain coverage under the Standard Insurance disability policy and declined Blue Cross medical coverage. Thus, plaintiff's "membership" in the personal choice account is limited to the brief period in which she obtained cancer coverage under the AFLAC policy.[4]

Plaintiff contends that she was a participant in the "plan" because, as a full time employee who had been working for 90 days as of May 1, 1990, she was eligible to elect coverage under any of the three different policies offered through her employer.[5] In addition, plaintiff

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It is undisputed that, at the time she filled out the application for cancer insurance with AFLAC, plaintiff omitted her recent cancer diagnosis from the application form. Once AFLAC discovered the omission, it immediately terminated the policy and returned the premiums to the plaintiff. Plaintiff contends that she withheld the information on the advice of Morrow. Regardless of the "unclean hands" of either party with respect to the disclosure to AFLAC, plaintiff's theory is that had she known about the AFLAC policy in May of 1990, she would have exercised the option, obtained the policy and would have been validly covered under the policy in July when she discovered she had cancer.

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If plaintiff is inferring that the employee handbook was a "plan" this theory also must fail. Although the handbook describes each of the available benefit options for qualified full-time employees, it was an merely overview and not a summary plan description under ERISA. See Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310 (3rd Cir. 1991) (plaintiff could not rely on overview brochure to contradict provision in policy enrollment card).

contends that she was a participant in a "personal choice account" which includes payment of premiums for the AFLAC cancer policy as a component of the plan. Defendants argue that each benefit insurance policy constitutes a separate "plan" for the purpose of determining whether plaintiff is a plan "participant." Thus, the issue presented is whether plaintiff's eligibility for participation in any of the defendants' proffered policy options is sufficient to give her "participant" standing for the purposes of this ERISA claim.

The ERISA statute which defines a "welfare benefit plan" sheds little light on the dispute in this case. A "plan" is simply any program established or maintained by an employer "for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . benefits in the event of sickness." 29 U.S.C. § 1002(1). I agree with plaintiff that the fact that an employer offers more than one benefit option package to its employees does not alter the fact that a plan is a "plan" for the purposes of ERISA. See Brundage-Peterson v. Compcare Health Services, 877 F.2d 509, 511 (7th Cir. 1989). However, plaintiff's contention that the decision in Brundage necessarily ends the issue of whether plaintiff is a plan participant is ill-founded. In Brundage, the plaintiff filed a state breach of contract action directly against the insurance company which issued her policy for a denial of benefits for medical expenses incurred when she suffered an "unusual illness." The insurance company removed the case to federal court on the basis of ERISA preemption because plaintiff had obtained the policy through her employer and the employer contributed premiums and collected and remitted premium payments via payroll withholding. The court held that the contractual arrangements between the insurance company and the employer, the eligibility requirement of being an employee for a certain period of

time and the employer's contributions were sufficient to find that the coverage was part of a "plan" under ERISA. Id., at 510-511. There was no dispute that Brundage was a participant in the plan at issue because she had elected coverage under defendant's policy and been denied benefits thereunder.

What cases like Brundage and Firestone, Reese and Olson demonstrate however, is that "participant" status depends upon a plaintiff's claim for benefits or other rights under the terms of an existing and valid policy. Thus, regardless of whether we view defendants' plan as a group of policies or we view the policies as a group of separate plans, liability under ERISA is governed by the express provision of § 1132(a) which provides for a civil action by a participant to recover, clarify or enforce benefit provisions. Like the claim in Reese, if successful, plaintiff's claim would result in a damage award, not a payment of "benefits" under the any plan provision. There is simply nothing in the statute which would extend liability to a claim for coverage under a policy that was never validly issued.

An additional justification for limiting ERISA's remedial scope to claims related to benefits, as opposed to a claim for coverage, becomes clear when I consider the possible remedies available against the employer even if I found plaintiff could establish a breach of an ERISA fiduciary duty. In this case, plaintiff seeks monetary compensation against the employer for damages equal to medical benefits that would have been paid had she been notified about the availability of cancer insurance in May of 1990 and exercised her option to obtain such a policy. Plaintiff does not dispute that so-called "extra-contractual damages" such as punitive damages or emotional distress damages may not be recovered under ERISA. See Olson, 960 F.2d at 1424, Reinhardt, J. concurring, citing Sokol v.

Bernstein, 803 F.2d 532 (9th Cir. 1986) (other citations omitted). Instead, plaintiff labels her prayer as "equitable" in nature and, thus, permissible as "such other appropriate equitable relief" permitted under 1132(a).

While plaintiff may label her prayer as "equitable" in nature, I find that she is in essence seeking extra-contractual compensatory damages which are unavailable under ERISA. For example, in Sokol, the Ninth Circuit rejected a similar argument against a plan fiduciary for emotional distress damages. The plaintiff, a named beneficiary in a pension plan policy, claimed that a trustee distributed trust funds without her authorization. The court rejected the claim and held that the "equitable relief" referenced in § 1132 was meant to provide declaratory or injunctive relief. In so holding, the court noted that "where a statute expressly provides a particular remedy, a court must be chary of reading others into it." Id., at 536, citing Massachusetts Mutual Life Ins. Co. v. Russell, 105 S.Ct. 3085, at 3093 (1985).[6] Thus, because ERISA does not provide for a cause of action for failure to notify an eligible employee about coverage options (as opposed to benefits available after coverage is obtained), I will not read as such an expansion into the statute.

Finally, I note that the remedy plaintiff seeks would be contrary to the overriding purpose of ERISA to protect plans as a whole, rather than individual participants. See Williams v. Caterpillar, Inc., 944 F.2d 658, 665 (9th Cir. 1991) (dismissal of claims by plan participants for oral misrepresentations which had no

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Even if plaintiff established a violation of a fiduciary duty against defendants, the "breach" by the employer would be the loss of the employer's premium contributions for the period of coverage. This was not a self-funded plan and, thus, the employer-defendants were never contractually obligated to provide medical benefit coverage.

impact upon plan itself); compare Amalgamated Clothing & Textile Workers v. Murdock, 861 F.2d 1406, 1411 (9th Cir. 1988) (plaintiffs had standing to seek constructive trust against plan fiduciary for alleged misuse of plan assets). Because the remedy plaintiff seeks in this case is personal to her and would have no direct effect on any aspect of the "plan" or defendants' administration of the health insurance options available to employees, her claim for benefits she would have received under the cancer policy if it had been issued must fail under ERISA.[7]

Based on the foregoing, I find that plaintiff is not a "participant" or "beneficiary" with respect to the AFLAC cancer coverage, and, thus, lacks standing to maintain an ERISA claim against her employer for breach of fiduciary duties or failure to provide AFLAC plan documents. Further, I find that, even if plaintiff had standing, she could not recover the type of compensatory damages sought in this case. I am fully cognizant of the fact that, with my earlier dismissal of plaintiff's common law claim for negligence against defendants on the basis that such claims are preempted by ERISA, plaintiff is now, essentially, without a remedy against her employer. However, the courts have recognized that ERISA has created a "gap," but that such a gap does not undermine the reasoning behind ERISA's broad preemptive reach. Olson, 960 F.2d at 1423. I find that this is one of those cases that falls within that "gap." Accordingly, defendants' motion for summary judgment #40 is granted and

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Given the limited equitable relief available under ERISA, even if plaintiff could maintain an action for breach of a fiduciary duty, her relief would be an order that she be given notice of the cancer coverage, which was satisfied in July of 1990, mooting any potential claim for injunctive relief.

plaintiff's cross-motion for summary judgment #36 is DENIED.

DATED this 29 day of October, 1992.

/S/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

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CLERK, US DISTRICT COURT
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PORTLAND, OREGON

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PAMELA J. McLEOD,	)	
	)	Civil No. 92-450-MA
Plaintiff,	)	
	)	
v.	)	
	)	
OREGON LITHOPRINT, INC., an Oregon corporation, dba News-Register Publishing Co., et al.	)	
	)	ORDER
Defendants.	)	

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MARSH, Judge.

Based upon my opinion filed herein this date, defendants' motion for summary judgment #40 is GRANTED and plaintiff's cross-motion for summary judgment #36 is DENIED.

DATED this 29 day of October, 1992.

/S/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

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	)	JUDGMENT
Defendants.	)	

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MARSH, Judge.

IT IS ORDERED AND ADJUDGED this action is dismissed.

DATED this 29 day of October, 1992.

/S/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

(2)

Supreme Court, U.S.
FILED
SEP 20 1995

No. 95-296

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PAMELA J. MCLEOD,

Petitioner,

v.

OREGON LITHOPRINT, INC., dba
NEWS-REGISTER PUBLISHING CO., and
NEWS-REGISTER EMPLOYEES' INSURANCE PLAN

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.1

Respondents have no parent companies and no subsidiaries that are not wholly owned.

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I. STATEMENT OF THE CASE

Petitioner claims that her employer and its health plan -- the respondents in these proceedings -- neglected to inform her that she had become eligible to apply, under the plan, for a cancer insurance policy from American Family Life Insurance Company ("AFLAC"). Two months later, her physician informed her that she had cancer. She then applied for the AFLAC policy, not disclosing her illness. AFLAC approved the application and issued the policy, but later rescinded when it discovered the pre-application diagnosis. Petitioner then filed this action against respondents under the Employee Retirement Income

Security Act (ERISA), 29 U.S.C. § 1001 et seq. See Pet. at 5a.

In her complaint, petitioner alleges that respondents breached a fiduciary duty under 29 U.S.C. § 1104(a)(1)(B) by failing to inform her of her right to apply for cancer insurance as soon as she was eligible. She seeks compensatory damages under 29 U.S.C. § 1132(a)(3)[1] equal to the benefits she would have received under the AFLAC policy if she had applied for it earlier, less the

---

[1] That section reads:

> (a) *Persons empowered to bring a civil action*
>
> A civil action may be brought --
>
> . . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

policy premiums. She also seeks compensatory damages for her emotional distress. See Pet. at 5a-6a and 16a.

The District Court granted respondents' motion for summary judgment on two grounds: first, petitioner is not a plan "participant" and thus lacks standing to bring an ERISA claim under Section 1132(a)(3); and, second, ERISA does not allow the relief petitioner seeks -- compensatory damages -- for the wrong she claims -- breach of a fiduciary duty under Section 1104(a)(1)(B). See Pet. at 17a-26a. The Court of Appeals for the Ninth Circuit disagreed with the first holding, see Pet. at 6a-8a, but agreed with the second, id. at 11a-12a, and so affirmed the judgment in all but

one particular.[2] As an additional basis for its ruling, the appeals court held that ERISA does not allow petitioner to bring an action on her own behalf rather than on behalf of the plan as a whole. Id. at 9a-11a.

Petitioner asked the Ninth Circuit to reconsider and, alternatively, to review the case en banc, but the court denied both requests. Pet. at 1a. Petitioner then filed a cert petition.

II. SUMMARY OF ARGUMENT

The court of appeals held that petitioner could not proceed with this action because ERISA does not allow a plan participant to sue the plan

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[2] The court remanded the case to the District Court for further proceedings on Petitioner's tangential claim that Respondents failed to provide plan documents promptly upon request. Pet. at 12a-14a.

administrator on her own behalf, only on behalf of the plan as a whole, and, in addition, because ERISA does not allow the relief petitioner seeks (compensatory damages) under the provision she cites (Section 1132(a)(3)). This Court recently agreed to hear a case -- Varity Corp. v. Howe, ___ U.S. ___, 115 S.Ct. 1792, 131 L.Ed.2d 720 (1995) (case no. 94-1471) -- that raises the first issue here: whether a plan participant can bring an action individually. But that is not a reason, as petitioner contends, for the Court to hear this case as well, because even if the Court holds that a plan participant can sue in her own right, there is still the problem that petitioner is seeking relief which ERISA does not allow -- compensatory damages. On that question the law is settled.

Just two terms ago, in Mertens v. Hewitt Associates, 508 U.S. ____, 113 S.Ct. 2063, 124 L.2d 161 (1993), the Court held that damage awards are not available under Section 1132(a)(3). That being so, petitioner cannot continue her claims here, no matter how the Court rules in Variety Corp. v. Howe on the individual-right-of-action question. Unless the Court is prepared to overturn Mertens so soon after it was decided, it should decline to hear this case.

III. ARGUMENT

The Court recently granted review in a case which raises the issue whether ERISA allows plan participants to sue for their own benefit, as opposed to the benefit of all participants, when the administrator breaches a fiduciary duty.

Varity Corp. v. Howe, supra. This case raises the same issue, and so petitioner asks the Court to review this case in conjunction with Howe. Pet. at 4. But this case raises another issue -- one on which the law is settled, and settled in a way that forecloses petitioner's claims. For that reason, the Court should decline to review this case notwithstanding Howe.

The other, dispositive issue is whether a compensatory damages are available in an action under 29 U.S.C. § 1132(a)(3). On that issue, the Court has already spoken. In Mertens v. Hewitt Associates, supra, the Court held that Section 1132(a)(3) does not permit damage awards.

Section 1132(a)(3) provides, inter alia, that an ERISA plan participant may

"obtain appropriate equitable relief" to redress a violation of ERISA or the plan. See note 1 at page 2 supra. Petitioner argues that "appropriate equitable relief" includes monetary relief in the form of compensatory damages. But Mertens holds otherwise.

The petitioners in Mertens were pension plan beneficiaries who claimed that the plan's actuary knowingly participated in a breach of duties which ERISA imposed on the plan's fiduciary, causing some loss of pension benefits. Maintaining that their claim sounded in equity, the petitioners argued that the actuary could be held liable for damages under Section 1132(a)(3). The Court disagreed:

> Petitioners maintain that the object of their suit is "appropriate equitable relief" under [Section 1132(a)(3)]. They do not, however,

> seek a remedy traditionally viewed as "equitable," such as injunction or restitution. (The Court of Appeals held that restitution was unavailable, . . . and petitioners have not challenged that.) Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages -- monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief. . . . And although we have never interpreted the precise phrase "other appropriate equitable relief," we have construed the similar language of Title VII of the Civil Rights Act of 1964 (before its 1991 amendments) . . . to preclude "awards for compensatory or punitive damages." . . .

113 S.Ct. at 2068 (emphasis in original; citations omitted).

The petitioners argued that the Court's reading of "equitable relief" was too restrictive and "faile[d] to acknowledge ERISA's roots in the common law of trusts," under which courts of

equity were empowered to award money damages. Ibid. The Court responded:

> The term "equitable relief" can assuredly mean, as petitioners and the Solicitor General would have it, whatever relief a court of equity is empowered to provide in the particular case at issue. But . . . "equitable relief" can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages). . . .
>
> In the context of the present statute, we think there can be no doubt. Since all relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief not at all. We will not read the statute to render the modifier superfluous.

Id. at 2068-69 (emphasis in original).

The Court went on to reject the petitioners' fallback argument that Section 1132(a)(3) should be construed to permit claims for monetary relief in

order to promote ERISA's goal of protecting plan participants and beneficiaries. "[V]ague notions of a statute's 'basic purpose,' the Court said, "are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. This is especially true of ERISA, an enormously complex and detailed statue that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs." Id. at 2071.

The Ninth Circuit followed Mertens in the case at hand. It held, consistent with Mertens, that petitioner could not bring an action for damages under Section 1132(a)(3), assuming she could bring any action in her own right. Unless the Court is prepared to reconsider Mertens

just two years after it was decided, it should decline to review this case.[3]

Petitioner tries without success to argue her way around Mertens. She contends that "appropriate equitable relief" under Section 1132(a)(3) must include money damages, because courts of equity have "traditionally granted any type of relief which is necessary to provide complete relief to remedy the

---

[3] Petitioner notes that the Sixth Circuit, in Warren v. Society Nat. Bank, 905 F.2d 975 (6th Cir. 1990), allowed a retirement plan participant to seek damages under Section 1132(a)(3). This ruling, she says, conflicts with the Ninth Circuit's ruling in the case at bar, justifying Supreme Court review. Pet. at 6. What petitioner fails to note, however, is that Warren pre-dates Mertens and thus is no longer good law. There is no reason to believe that the Warren court, writing today, post-Mertens, would still approve damage awards in Section 1132(a)(3) actions. Thus, the alleged "conflict among the circuits" is illusory.

Petitioner also contends that the Ninth Circuit's decision in the instant case, disallowing legal relief under Section 1132(a)(3), conflicts with the Third Circuit's decision in Bixler v. Cent. Pa. Teamsters Health-Welfare Fund, 12 F.3d 1292 (3rd Cir. 1993). But here again there is no actual conflict. The Bixler court allowed the widow of a plan participant to bring an individual action under ERISA to recover her husband's medical expenses and death benefits, which, although monetary, is equitable, not legal, relief.

wrongs," and because "courts of equity have traditionally provided for the payment of money as a form of equitable relief." Pet. at 21 and 23.[4] But as noted above, the Mertens Court considered and rejected those very arguments, which are no more persuasive in this case than they were in that one. Without more -- and there is nothing more -- the Court should not grant review to rethink those arguments.

Petitioner tries to distinguish Mertens by noting that the defendant in that case was not an ERISA "fiduciary," as are the defendants here. Pet. at 15a. But that fact was not essential to the

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[4] Petitioner acknowledges that she seeks compensatory damages -- monetary relief for the losses she allegedly suffered as a result of respondents' failure to inform her of her eligibility for cancer insurance, as well as for her emotional distress over those losses. Pet. at 3. She does not contend that the money she seeks to recover from respondents can or should be characterized as restitutive or injunctive or as any other form of "traditional" equitable relief.

decision in Mertens holding, as the Mertens Court itself made clear. At the outset of its opinion, the Court noted that neither party had addressed the threshold question whether a nonfiduciary could be held liable under ERISA, let alone liable for damages. While expressing doubt that ERISA's remedies apply to nonfiduciaries, the Court nevertheless proceeded to determine the scope of those remedies: "[A]though we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remedial wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen, and reserve decision of that antecedent question." 113 S.Ct. at 2067-68. That "narrow battlefield" was, of course, whether money damages constitutes

"appropriate equitable relief" under Section 1132(a)(3). Answering that question in the negative, the Court assumed that nonfiduciaries were subject to suit under Section 1132(a)(3) to the same extent as fiduciaries. And so the fact that the defendants in this case are fiduciaries while the defendants in Mertens were not is not a basis for distinguishing the two cases.

Finally, petitioner argues that "a major problem exists with the language of [Section 1132(a)(3)]" if it does not allow plan participants to sue for damages, because the participants will be left without a remedy for wrongful conduct by plan fiduciaries. Pet. at 8. In fact, plan participants are not remediless; they are entitled, of course, to "appropriate equitable relief" under

Section 1132(a)(3). If that remedy is inadequate in a substantial number of cases -- and petitioner has not shown that it is; she merely speculates to that effect -- then she should apply to Congress for an amendment to the law. It is not for the courts to correct perceived "problems" in statutory language, especially when the language is, as noted above, part of "an enormously complex and detailed statue that resolve[s] innumerable disputes between powerful competing interests." Mertens, 113 S.Ct. at 2071.

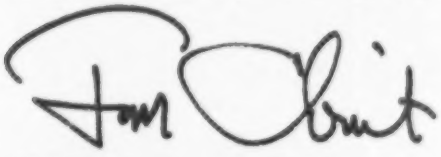
In sum, Mertens answers all of the questions petitioner now poses concerning the scope of relief under Section 1132(a)(3). There is nothing left for the Court decide and thus no reason for

it to hear this case. The Court should, therefore, deny review.

IV. CONCLUSION

The Court should deny review.

Respectfully submitted,



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